building of the houses within three months after the plans for the septic tanks had been supplied to the plaintiff. On the evidence adduced by both the plaintiff and the defendants, it is my judgment that there is no merit in the defendants' counterclaim."

I would, therefore, dismiss the cross-appeal with costs in respect thereof.

In the result I would allow the appeal and dismiss the cross-appeal with costs.

Gill C.J. (Malaya) and **Raja Azlan Shah F.J.** concurred.

Appeal allowed. Cross appeal dismissed.

Solicitors: *Allen & Gledhill; Chin, Sethu & Co.*

HAJI HAMID BIN ARIFFIN & ANOR. v. AHMAD BIN MAHMUD

[F.C. (Suffian L.P., Ali and Wan Suleiman F.JJ.) April 24, 1976]

[Alor Star — Federal Court Civil Appeal No. 57 of 1975]

Land Law — Malay Reservation — Land sold to Siamese — Sale void — Kedah Malay Reservation Enactment (No. 63), s. 6.

In this case the registered proprietor of Malay Reservation land Mahmud bin Samad, a Malay, had sold it to a Siamese lady. On execution of the agreement, possession of the land and of the title deed to the land was given to the purchaser. Subsequently the Siamese lady sold the land to the appellants, who were Malays. The land was still registered in the name of Mahmud, who had since died. In this case the appellants who were administrators of the estate of the Siamese lady sued the administrator of Mahmud's estate for specific performance. It was agreed that the sole question for decision was whether the sale by Mahmud to the Siamese lady was enforceable under the provisions of the Kedah Malay Reservation Enactment (No. 63). The learned trial judge held that the sale was void. The appellants appealed to the Federal Court.

Held, dismissing the appeal, by virtue of section 6(2) of the Kedah Malay Reservations Enactment, the purported sale was void *ab initio* and it could not be enforced by the purchaser nor could the purported purchaser pass a good title to another, even if he be a Malay.

Cases referred to:-

(1) *Goh Soon Leong* v. *Commissioner of Lands & Ors.* [1951] M.L.J. 201.

(2) *Foo Say Lee* v. *Ooi Heng Wai* [1969] 1 M.L.J. 47.

(3) *Mistry Amar Singh* v. *Serwano Wofunira Kulubya* [1963] 3 W.L.R. 513; [1964] A.C. 142.

FEDERAL COURT.

Mayandi for the appellant.

G. N. Christie for the respondent.

Suffian L.P. (read by Wan Suleiman F.J.): This is a dispute concerning a piece of Malay Reservation Land comprised in Surat Putus No. 5275 in the District of Kota Setar, Kedah.

The agreed facts in the case are short and simple. In 1944 its registered proprietor, one Mahmud bin Samad (a Malay), sold the land to a Siamese lady, Ah Yam d/o Ah Nam @ Nyonya Yam d/o Indin Nom.

On execution of the agreement, possession of the land and of the title deed to the land was given to the purchaser. The purchase price was paid in three instalments.

Subsequently the Siamese lady (now deceased) sold the land to the present plaintiffs who are Malays.

The land is still registered in Mahmud's name. Mahmud has since died.

The present plaintiffs as administrators of the Siamese lady's estate sued the administrator of Mahmud's estate for specific performance.

At the hearing it was decided by counsel that the sole question to be decided was whether the sale in 1944 by Mahmud to the Siamese lady was enforceable under the provisions of the Kedah Malay Reservation Enactment (No. 63), it being understood that if it was not so, then there could not be specific performance in favour of the plaintiffs.

The learned trial judge held that it was void because of section 6 of the Enactment.

That section reads as follows:

"6. (1) Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer ... or otherwise, in any person who is not a Malay and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer ... or otherwise, in any person who is not either a Malay or a Siamese.

(2) Any document or agreement purporting to vest in any person any right or interest contrary to the provisions of sub-section (1) shall be void."

His Lordship held that therefore the second sale by the Siamese lady to the plaintiffs is also void although the plaintiffs are also Malays, and dismissed the plaintiffs' claim. The plaintiffs have appealed to us.

It was first argued by Mr. Mayandi on their behalf that the learned judge's decision is not correct on the following ground: the first sale by Mahmud to the Siamese lady was only voidable at the instance of the vendor, the second sale cannot be void as the land has come back into the hands of a Malay. Every enactment must be looked at in the spirit in which it was enacted. In the case of the Malay Reservation Enactment and in particular its section 6, the aim was to safeguard Malay ownership of Malay Reservation lands. As the plaintiffs are Malays, the court should help them and order the land to be vested in them.

Mr. Mayandi relied on a decision of the Court of Appeal in *Goh Soon Leong* v. *The Commissioner of Lands & Ors.*[1]

Goh Soon Leong's case was not cited before his Lordship. It was said that had it been cited, the learned trial judge would probably have held that the first sale by Mahmud to the Siamese lay was not absolutely prohibited or necessarily void *ab initio* and therefore the second sale by the Siamese lady to the plaintiffs who are Malays was valid.

Secondly, it was argued by Mr. Mayandi that the vendor Mahmud, having sold the land and delivered

possession to the Siamese lady, is in equity a trustee for her; that as only a transfer to a non-Malay cannot be effected, the subsequent purchaser (being a *bona fide* Malay purchaser for value without notice) should not be penalised; and that if he had been the first purchaser, this matter would not have come to court at all.

Thirdly, it was submitted that as far as possible the courts should uphold an agreement of sale, especially to a *bona fide* purchaser for value without notice.

I am of the opinion that the main issue here is whether or not the first sale by Mahmud to the Siamese lady was void.

The facts in *Goh Soon Leong's* case were as follows:

During the enemy occupation a Malay vendor of Malay Reservation in Kedah sold and transferred it to a non-Malay, with the permission of the Japanese authority.

Subsequently the land was sold and transferred to a second non-Malay. After the war, the Collector expunged the memorials of the transfers, thus restoring the original Malay vendor to the register.

A third non-Malay, who held a decree against the Malay vendor, then sought to attach the land; this decree holder was a stranger to all the dealings with the land. The second non-Malay purchaser applied to the Commissioner of Lands to restore the memorials of transfer; he also applied to the State Council to excise the land from the Malay Reservation; the Council deferred their decision, probably because litigation was pending.

The Commissioner's delegate held an enquiry with the proper parties before him; he ascertained the facts and decided that the purchaser had the higher equity and he accordingly ordered restoration of the transfers.

Delivering the judgment of the Court of Appeal Taylor J. said:

"The principal question in the appeal turns on the construction of the Malay Reservation Enactment, No. 63. Section 6 does not, in terms, forbid the making of a transfer by a Malay to a non-Malay; it enacts only that such a transfer shall not operate to vest the land in a non-Malay, save as provided by the subsequent sections. Section 7 enacts that if a Malay attempts to vest his land in a manner contrary to section 6, the State Council may forfeit the land unless the transferor shews cause against the forfeiture. Section 4 enables the State Council to revoke the declaration of a Malay Reservation, as to a part of the area, i.e. to excise a specified lot, at any time, on the application of any person. The construction which, after consultation, the members of the court put upon these provisions, read as a whole, is that a transfer to a non-Malay *is not absolutely prohibited or necessarily void ab initio;* the transferor risks forfeiture but he does not incur an automatic forfeiture; he is assured of a hearing and if he can satisfy the Council, they will not enforce the forfeiture and in such a case they will, presumably, excise the land from the Reservation."

The court then allowed the transferee to renew his application to the State Council.

I agree with every word in the above extract, but with the deepest respect I am unable to agree with the words italicized.

In considering the Enactment, it is necessary to distinguish on the one hand the relations of a registered proprietor of Malay Reservation land with persons with whom he deals such as a purchaser, a chargee or a lessee, and on the other hand his relations with the State.

With regard to his relations with persons with whom he deals, if he sold his land to a non-Malay and executed an agreement purporting to vest it in a non-Malay, then clearly that agreement being "contrary to the provisions of subsection (1) of section 6" is void. This is explicitly provided for by subsection (2) of section 6. To hold otherwise would be flying in the teeth of the clearest language used by the legislature. That subsection in my opinion is decisive and renders the purported sale void *ab initio.* It cannot be enforced by the purchaser. Nor can the purported purchaser pass a good title to another, even be he a Malay: *nemo dat quod non habet.*

The Court of Appeal judgment in *Goh's case* refers to section 6, but makes no mention of subsection (2). It may well be that the explicit language of this provision had escaped their attention. For this reason, it would appear that their Lordships had made their decision *per incuriam.*

It may also well be that the Court of Appeal in *Goh* was greatly influenced by the fact that the Malay vendor there *had* obtained the permission of the Japanese authority.

Sections 4, 7 and 19 on the other hand govern the relations of the Malay registered proprietor of Malay Reservation land not with persons with whom he deals, but his relation with the State Authority.

These three sections read as follows:

"4. The Ruler in Council may at any time either at its own instance or upon the application of any person by declaration in the Gazette:

(a) alter the limits or boundaries of any Malay Reservation, or

(b) revoke any declaration under section 3, either as to the whole or any part of the area therein referred to, or

(c) include in any Malay Reservation any land excluded therefrom.

Such declaration shall take effect on publication thereon in the Gazette."

"7. If at any time it shall appear to the satisfaction of the Ruler in Council that any Malay or Siamese has attempted to vest in any person any Reservation land held by him under any document of title, contrary to the provisions of section 6, the Ruler in Council may, by order in writing, signed by the Ruler in Council, direct that all interest of such Malay or Siamese as the case may be, in such land shall be forfeited and upon the registration of such written order in the manner prescribed in Enactment No. 56 (Land), such land shall vest in Sultan absolutely; provided that one month's notice to shew cause against such forfeiture shall have been served upon such Malay or Siamese, as the case may be, and cause shall not have been shewn to the satisfaction of the Ruler in Council within the period prescribed in the notice."

19. The Ruler in Council may, in his discretion, notwithstanding anything in this Enactment contained, by order in writing declare that any person of any race or nationality be deemed to be a Malay for the purposes of this Enactment, and such person shall then be deemed to be included in the term 'Malay' wherever it shall occur in this Enactment or in any amendment or re-enactment thereof."

Under the above three sections the State may forfeit his land if a Malay attempted to dispose of it to an unqualified person or it may approve the sale

and allow the land to be excised from the Reservation under section 4 or declare the purchaser a Malay under section 19. But in my humble judgment, whether or not the State Authority exercises its discretion to do any of these things cannot whittle down the plain language of subsection (2) of section 6 which bluntly says that the purported document or agreement of sale "shall be void".

Be it noted that the purported sale here was an "outright" sale. I would be inclined to consider it valid if it had been conditional and expressed to be subject to the State Authority (1) allowing the land to be excised under section 4 or (2) agreeing to declare the Siamese lady a Malay for the purposes of the Enactment under section 19, for such an agreement of sale does not purport to vest in a non-Malay right or interest in Malay Reservation land and is *not* "contrary to the provisions of subsection (1) of section 6"; vide *Foo Say Lee* v. *Ooi Heng Wai*.[2]

In the circumstances I would therefore dismiss this appeal, with costs. The appellants' deposit to be paid to the respondent against his taxed costs.

Wan Suleiman F.J.: The appellants, the co-administrators of the estate of Ah Yam d/o Ah Nam @ Nyonya Yam d/o Indin Nom, who were the plaintiffs in the court below had there sought to obtain specific performance of an agreement of sale of a piece of land comprised in Surat Putus No. 5275, Mukim of Pumpong, District of Kota Star. The agreement is dated January 1, 1944, and the action was brought against the estate of Mahmud bin Samad, deceased of which the defendant/respondent is the administrator.

The facts which are not in dispute are as follows:

1. An agreement was executed for the sale of the said land on January 1, 1944 between Mahmud and Nyonya Yam.
2. On the execution of the said agreement possession of the land and the title deed were handed over by Mahmud to Nyonya Yam after the purchase price had been settled by three instalments. The title deed, however, is still registered in the name of Mahmud.
3. Subsequently Nyonya Yam sold the said land to the present plaintiffs who being appointed administrators of the said estate on her death served notice on the defendant to execute a proper and registrable transfer of the land to them. On the failure by the defendant to comply with such notice, the plaintiffs filed this action. Both here and in the court below it was also agreed that the only issue for determination is whether the agreement of sale made in 1944 between Mahmud and Nyonya Yam is enforceable.

The learned trial judge considered the effect of section 6(1) of the Enactment which reads as follows:—

"Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a charge or otherwise, in any person who is not either a Malay or a Siamese."

His Lordship held that though this subsection is worded in the negative form, it shows clearly that Reservation land held by a Malay under a document of title can only be transferred by sale, etc. to another Malay so as to vest a right or interest therein by such transfer. Where the title is held by a Siamese a transfer by sale is only valid when made by a Malay or Siamese.

He also considered the effect of subsection (2) of section 6 which reads:—

"Any document of title or agreement purporting to vest in any other person any right or interest contrary to the provisions of subsection (1) shall be void."

In the result his Lordship held that the agreement of 1944 which purports to vest proprietorship of the land in Nyonya Yam is void and therefore can be of no effect, and dismissed the plaintiffs' claim.

Against this decision the plaintiffs appeal. Mr. Mayandi on their behalf submitted that the judge was wrong in holding the first sale was void *ab initio*. He cited the decision in *Goh Soon Leong* v. *The Commissioner of Lands and Two Ors.*,[1] an authority which was not brought to the notice of the learned judge. In that case the Court of Appeal held that a transfer to a non-Malay is not absolutely prohibited or necessarily void *ab initio;* that the transferor risks forfeiture but he does not incur an automatic forfeiture, and that he is assured of a hearing and if he can satisfy the State Council, they will not enforce the forfeiture and in such a case they will, presumably, excise the land from the Malay Reservation.

The facts of that case may be summarised thus:—

During the Japanese occupation a Malay holder of a Malay Reservation Land in Kedah sold and purported to transfer it to a non-Malay, with the permission of the Japanese authority, and the land was later transferred to another non-Malay; after the war, the Collector expunged the memorials of the transfers, thus restoring the Malay vendor to the register. A third non-Malay, who held a decree against the vendor then sought to attach the land; this decree-holder was a stranger to all the dealings with the land. The last purchaser appealed to the Commissioner of Lands to restore the memorials of transfer; he also applied to the State Council to excise the land from the Malay Reservation. The Council deferred their decision, probably for the reason, *inter alia*, that litigation was was pending. It was shown that in view of the unusual conditions during and since the war excisions had been made in comparable cases.

The Commissioner's Delegate appointed under the Title to Land (Occupation Period) Ordinance F. of M. 39/1949 held an enquiry with the proper parties before him. He ascertained the facts and delivered a well-reasoned judgment, stating the principles which he considered applicable. These principles were mainly equitable. His conclusion was that the purchaser had the higher equity and he accordingly ordered restoration of the transfers.

From the decision of the Director of Lands, as Delegate of the Commissioners of Lands, the other party appealed to the High Court in Alor Star which dismissed that appeal. From the decision of the High

Court the other party again lodged an appeal to the Court of Appeal. The decision of the Court of Appeal was therefore for the sole purpose of deciding whether the order of the Collector of Land Revenue made under section 13 of the Titles to Land (Occupation Period) Ordinance was correct or not. The Court Appeal did not decide that *all* transfers to non-Malays are *not* void *ab initio*, but that such transfers are not necessarily void *ab initio*. Clearly their Lordships had in mind those instances which come within the provisos in subsequent sections. Of this I shall have more to say at a later stage.

Mr. Mayandi's contention is that the first sale was not void and likewise the second sale by the Siamese lady to the plaintiffs was also not void. He added that the object of the Malay Reservation Enactment was to protect Malays, that plaintiffs here are Malays and that the second sale was within the spirit of the enactment.

Mr. Christie for the respondent touched upon a very relevant point. He pointed out that section 4 being previous to section 6 cannot be one of those provisos which can save any document or agreement from being contrary to section 6 and that only subsequent sections can. In other words the possibility that the State Council (or its present equivalent) may be prevailed upon to excise the land from the Malay reservation would not save a transaction which otherwise offends section 6. Of course the wording of section 6(1) shows that he is correct.

As Taylor J. said in *Goh Soon Leong's* case, "section 6 does not, in terms, forbid a transfer by a Malay to a non-Malay; it enacts only that such a transfer shall not operate to vest land in a non-Malay, save as provided by the *subsequent* sections." The only two sections which come within this category, are in my view sections 9 and 11.

Sections 9 permits a lease of reservation land by a Malay to a person other than a Malay or by a Siamese to a person other than a Malay or Siamese so long as the term does not exceed three years subject further to the two provisos in the same section.

Section 11 permits the sale of reservation land to non-Malays under certain circumstances, namely:

(1) where reservation land held by Malays or Siamese under any document of title is

(a) the subject of a charge created *prior* to the declaration by which the land was included in a Malay Reservation, or

(b) where the owner of such land had *prior* to such declaration entered into an agreement, or

(c) was under a legal obligation to transfer such land to a person not being a Malay or Siamese,

such land may with the written consent of the President of the State Council and subject to such conditions or limitations as he deems fit be sold

(i) in the case of a charge to a person of any race upon the application of the chargee, and

(ii) in the case of an agreement or legal obligation to transfer, be transferred irrespective of race to the person to whom the owner had agreed or was otherwise under a legal obligation to transfer the land or to the latter's heirs or assigns.

It should also be noted that in *Goh Soon Leong's* case the Court of Appeal did not say that the various transfers to non-Malays of the Reservation Land was not void. There had been an application by the eventual transferee to the State Council for excision of the land from the Malay Reservation and their Lordships clearly felt that if such application was subsequently approved the effect of the Commissioner's decision to put the non-Malay transferee back on the register of titles would validate the transfer to him.

I must confess that I find it extremely difficult to agree that the order by the Delegate of the Commissioner in ordering restoration of the transfers was correct. With great reluctance, I find myself compelled to say that I am unable to agree with the ratio in *Goh Soon Leong's* case. Their Lordships observed that the order of the Commissioner's Delegate had exhausted the effect of the Titles Ordinance and that if nothing more was done there would be a deadlock so that to remove that deadlock and vest the proprietorship in the transferee, the latter would have to be successful in his application for excision of the land from the Malay Reservation. The provisions of section 43(3) of Kedah Land Enactment (Cap. 56) were obviously overlooked for under that subsection, the registration of any proprietor obtained *inter alia* by means of void *instrument* would result in the registration itself being void, because both documents of transfer in that case, being documents purporting to vest proprietorship rights in the transferee, were contrary to section 6(1) of the Malay Reservation Enactment, and would therefore be void instruments or documents within the meaning of section 6(2) of the same enactment.

In any case, the facts in the present appeal are somewhat different. It should be noted that it is the administrators of the transferee, who are trying to enforce the agreement of sale of January 1, 1944. This agreement does not come within the category of agreements which can be saved by subsequent sections, i.e. section 9 or section 11 and there is no pending application for excision under section 4. It is an agreement purporting to vest in Ah Yam a right or interest contrary to the provisions of section 6(1) and because of the unequivocal terms of section 6(2) it is void *ab initio*. The plaintiffs therefore cannot rely on this void and illegal agreement to justify their claim of title to the land. (See *Mistry Amar Singh and Serwano Wofunira Kulubya*[3]).

I would therefore respectfully agree with the decision of the learned judge and dismiss this appeal with costs.

Ali F.J. concurred.

Appeal dismissed.

Solicitors: *Mayandi & Panjaram; Naughton Christie & Co.*